

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANANIAS TISBY and DEPARTMENT OF THE NAVY,
MARINE CORPS LOGISTICS SUPPORT BASE PACIFIC,
Barstow, CA

*Docket No. 99-1885; Submitted on the Record;
Issued March 1, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$5,031.03 for the period July 16, 1991 through October 15, 1994 because he received compensation at the three-fourth augmented rate; and (2) whether the Office properly found that appellant was at fault in the creation of the overpayment.

On April 27, 1978 appellant, then a 56-year-old rigger, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right hand while installing a gun tube.

The Office accepted appellant's claim for a crush injury of the right hand, closed comminuted displaced fracture of the right little finger, laceration of the right palm and right shoulder tendinitis.¹

In a letter dated December 21, 1994, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$5,986.92 for the period July 16, 1991 through November 12, 1994 because appellant accepted compensation at the three-fourth augmented rate following his divorce effective July 16, 1991. The Office found that appellant was with fault in the creation of the overpayment. The Office also advised appellant that he had the right to submit any additional evidence or arguments if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own, and if he believed that recovery of the overpayment should be waived. In response, appellant submitted factual evidence.

¹ Appellant retired from the employing establishment on disability effective April 10, 1979.

By decision dated January 23, 1995, the Office finalized its overpayment decision and finding of fault. On February 7, 1995 appellant, through his representative, appealed the Office's decision to the Board.

By order dated June 24, 1996, the Board remanded the case to the Office for reconstruction and proper assemblage of the case record.

By letter dated December 16, 1998, the Office made a preliminary determination that an overpayment of compensation had occurred in the amount of \$5,031.03 for the period July 16, 1991 through October 15, 1994 because appellant accepted compensation at the three-fourth augmented rate following his divorce effective July 16, 1991. The Office found that appellant was with fault in the creation of the overpayment. The Office also advised appellant that he had the right to submit any additional evidence or arguments if he disagreed that the overpayment occurred, if he disagreed with the amount of the overpayment, if he believed that the overpayment occurred through no fault of his own, and if he believed that recovery of the overpayment should be waived.

On January 12, 1999 appellant requested that the Office make a decision based on the written evidence on the issues of fault and possible waiver. His request was accompanied by a completed overpayment questionnaire.

By decision dated February 4, 1999, the Office finalized its overpayment decision and finding of no fault. The Office noted that the overpayment had already been collected.

The Board finds that the Office properly determined that appellant received an overpayment of compensation in the amount of \$5,031.03 for the period July 16, 1991 through October 15, 1994 because he received compensation at the three-fourth augmented rate.

Section 8129(a) of the Federal Employees' Compensation Act provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.² The only exception to this requirement is a situation which meets the test set forth as follows in section 8129(b): "[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."³ Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.⁴ In evaluation of whether appellant is at fault, the Office will consider the circumstances surrounding the overpayment.⁵

² 5 U.S.C. § 8129.

³ 5 U.S.C. § 8129(b).

⁴ *Harold W. Steele*, 38 ECAB 245 (1986).

⁵ 20 C.F.R. § 10.433(b).

The record reveals that appellant received compensation in the amount of \$5,031.03 because he received compensation during the period July 16, 1991 through October 15, 1994 at the three-fourth augmented rate rather than the two-third rate.

The Board further finds that the Office properly found that appellant was at fault in the creation of the overpayment.

In determining whether an individual is at fault, section 10.433(a) of the regulations provides in relevant part:

“A recipient who has done any of the following will be found at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.”⁶

In this case, the Office applied the third standard -- appellant accepted payments which he knew or should have known to be incorrect -- in finding appellant to be at fault in the creation of the overpayment. Appellant began receiving compensation on June 12, 1978 at the three-fourth augmented rate based on having a wife as a dependent. He signed numerous Forms CA-1032 forms listing his wife as a dependent. Appellant also signed two of these forms subsequent to his divorce. The form explained whom appellant could claim as a dependent, such as a spouse who is a member of your household.

Appellant submitted a June 22, 1992 letter advising the Office that he was separated from his wife and that the divorce was final. He further advised the Office that he was ordered to pay spousal support as part of the divorce agreement. Appellant questioned whether his wife was still considered his dependent.

By letter dated July 9, 1992, the Office requested that appellant submit a copy of his divorce decree with the court order demanding payment of spousal support. On September 11, 1992 the Office received the requested documents indicating that appellant's divorce was effective July 16, 1991. However, the Office continued to pay appellant compensation at the three-fourth augmented rate.⁷

The Board finds that the signed CA-1032 forms, together with the June 22, 1994 letter, indicate that appellant knew or should have known the compensation checks received after his divorce on July 16, 1991 contained an amount to which he was not entitled. Further, while the

⁶ 20 C.F.R. § 10.433(a)(1)-(3).

⁷ The Office changed appellant's pay rate to two-thirds effective October 15, 1994 in light of his divorce.

Office may have been negligent in issuing appellant compensation checks for wage-loss compensation at the augmented rate after receipt of the June 22, 1992 letter from appellant concerning his divorce, this does not excuse appellant's acceptance of checks which he knew or should have known to be for an incorrect amount.⁸ Accordingly, the Board finds that the Office properly determined that appellant accepted compensation checks which he knew or should have known to be incorrect for the period July 16, 1991 through October 15, 1994, and therefore, he was at fault in the creation of the overpayment during that period.⁹

The February 4, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 1, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

⁸ See *Thomas Donahue*, 39 ECAB 336, 340 (1988); *David Wilson*, 37 ECAB 323, 328 (1986); *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

⁹ The Board notes that appellant has already repaid the overpayment.